Supreme Court of the United States

October Term, 1973

No. 73-5412

John R. Dillard and Willie Williams,
individually, and on behalf of
all other persons similarly
situated,

Appellants,

v.

Industrial Commission of Virginia,
Thomas M. Miller, Chairman, Industrial Commission
of Virginia, M. Edward Evans, Robert P. Joyner,
Commissioners of the Industrial Commission of Virginia,
and Aetna Casualty and Surety Company,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR APPELLEE AETNA CASUALTY AND SURETY COMPANY

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March 2, 1974

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STATEMENT

A. John R. Dillard

Appellant, John R. Dillard, was injured on March 15, 1971. On March 30, he and his employer, Roanoke Mills, Incorporated, entered into a Memorandum Agreement whereby Aetna Casualty & Surety Company ("Aetna")

would pay plaintiff $40.80 per week until there was a "change of condition." On April 7, 1971, the Industrial Commission of Virginia ("Commission") approved this agreement. (App. 11).

On June 3, 1971, Aetna brought Dillard's payments up to date, filed an application for a hearing upon an alleged change in condition and ceased further payments. (App. 12). The Commission scheduled a hearing for July 16. On August 25, 1971, the Commission ruled that Dillard was still unable to work and continued the original award. (App. 13-16).

On September 16, 1971, Aetna filed another application for a hearing based on Dillard's alleged refusal of medical treatment and notified Dillard of its actions and reasons. (App. 17). Compensation was discontinued as of the date of filing, and on October 19, 1971, this suit was filed. On October 22, 1971, at the request of Roanoke Mills, Incorporated and Aetna, the Commission dismissed the application for a hearing.

On February 24, 1972, defendants answered interrogatories. (App. 30-33 and 36-38). On March 21, 1972, the Commission amended Rule 13.

B. Willie Williams

Appellants' brief adequately states the facts before the Court with regard to the intervenor, Willie Williams.

VIRGINIA'S WORKMEN'S COMPENSATION ACT

The Act provides compensation, in the nature of insurance, to a workman or his dependents in the event of his death, for the loss of his opportunity to engage in gainful employment when his disability or death was occasioned

by accidental injury or occupational disease arising out of and in the course of his employment. The pecuniary loss incident to payment of compensation to an employee is cast upon his employer as an expense of the business, *Fauver* v. *Bell,* 192 Va. 518, 65 S.E.2d 575 (1951); but it is not a form of health insurance, *Rust Eng. Co.* v. *Ramsey,* 194 Va. 975, 76 S.E.2d 195 (1953).

The Act was intended to eliminate the employer's common law defenses of assumption of risk, fellow servant and contributory negligence. Lower courts frequently held initially that workmen's compensation laws took the employer's property without due process. *E.g., Ives* v. *South Buffalo Ry.,* 201 N.Y. 271, 94 N.E. 431 (1911). This Court, however, consistently held that they were within the police power of the state. *Arizona Copper Co.* v. *Hammer,* 250 U.S. 400, 419 (1919).

Although in derogation of the common law, the Virginia Act is liberally construed in favor of the workman. *Griffith* v. *Raven Red Ash Coal Co.,* 179 Va. 790, 20 S.E.2d 530 (1942).

The Act is enforced by the Industrial Commission of Virginia, an administrative agency having both regulatory and judicial functions. The Commission operates within a general legislative framework and provides an impartial and informed forum for disputes that arise under the Act.

A hearing before the Commission provides speedier recovery and more informal rules of evidence than a traditional court The Commission is admonished to keep its procedures and rules "as summary and simply as reasonably may be." Va. Code § 65.1-18.

Awards are commenced either by Commission approval of a Memorandum of Agreement between the employer and

employee (App. 11) or a decision of the Commission. An award to an employee consists of medical benefits for at least three years and weekly benefits of the lesser of 66⅔% of his average weekly wage or $80.00 "during such incapacity."[1] The award may be based on temporary total incapacity, temporary partial incapacity, permanent partial incapacity or death. It continues until modified or terminated by the Commission.

Although the award commands the employer to make certain payments, it is not self-executing. Va. Code § 65.1-100. An outstanding award must be enforced by a court of general jurisdiction. The Commission and courts are, however, empowered to apply fines and other penalties to recalcitrant employers. Va. Code §§ 65.1-75.1 and -101.

There are three procedural methods of terminating or modifying an outstanding award. First, the employee and employer may execute an Agreed Statement of Facts by which they agree that conditions have changed which justify a termination of the award. Second, the employee and the employer may enter into a Supplemental Memorandum of Agreement whereby the terms of the outstanding award are modified by either increasing or decreasing the compensation. Third, the employer or employee may file an application for hearing based on a change of condition.

Under early practice some employers arbitrarily disregarded the effects of outstanding awards and terminated payments. *Manchester Board and Paper Co.* v. *Parker*, 201 Va. 328, 331, 111 S.E.2d 453, 456 (1959). To protect the employee from this conduct, the Commission required the employer or carrier to pay all back compensation under an outstanding award as a condition to

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[1] Depending on the nature of injury, there may be a maximum number of weeks of benefits. E.g., Va. Code §§ 65.1—54-56 (Supp. 1973).

obtaining a hearing on an application for review of award on the ground of a change in condition. In upholding a constitutional challenge to the rule, the Supreme Court of Appeals of Virginia held that the rule was constitutional although it might cause "harsh results" for the employer. *Manchester Board and Paper Co.* v. *Parker, supra*, 201 Va. at 331, 111 S.E.2d at 456.

On March 21, 1972, the Commission increased the employee's protections. Under Rule 13, the Commission will not now grant an employer or carrier a hearing until the petitioner (1) pays the award to date,[2] (2) files a verified application stating the reasons for the termination, and (3) furnishes evidence which the Commission finds sufficient to show probable cause that there is a change in condition. As a matter of practice, applicants notify the claimant simultaneously with the filing of the application. (App. 17 and 75).

Applicants usually cease paying compensation at the time they file the application based on a change of condition, but the actual award is changed only by order of the Commission following a full hearing or agreement of the parties. Although the award speaks in terms of continuing "during incapacity," incapacity can be challenged only before the Commission. Therefore, the employee can enforce payments even after the Commission finds "probable cause" to believe a change has occurred and schedules a hearing just as he can enforce an award against a recalcitrant employer who suspends payments without probable cause. A decision favorable to the employer speaks as of the date of

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[2] If the application is based on Va. Code § 65.1-63 (refusal of selective employment), § 65.1-88 (Supp. 1973) (refusal of medical attention) or § 65.1-91 (refusal of medical examination), the employer must pay the benefits to within 14 days of the application or the date of occurrence, whichever last occurs.

filing, but the employer has no right of recoupment or set-off against the employee. Va. Code § 65.1-99; *Manchester Board and Paper Co.* v. *Parker, supra.*

Thus, if the Commission accepts an employer's application, the employer is granted a hearing. If the employer prevails, the benefits do not resume unless the employee has a subsequent change in condition justifying a reinstatement of the award. If the Commission rejects the employer's application for termination or modification of benefits, the award is not modified and continues to be enforceable in a court of record.

Although the award is payable "during incapacity," circumstances other than recovery or return to work may disentitle the employee to payments. If an employee wrongfully refuses medical attention (Va. Code § 65.1-88 [Supp. 1973]), selective employment (§ 65.1-63) or medical examination (§ 65.1-91), the Commission must terminate the award.

An employee may have benefits reinstated 14 days prior to his application under Va. Code § 65.1-99 or on the date of change of condition, whichever last occurs.

SUMMARY OF ARGUMENT

I. The Commission's award continues "during incapacity" but remains outstanding until altered or terminated by the Commission. The award is not self-executing, but may be enforced in a court of general jurisdiction. Rule 13, promulgated pursuant to the Commission's power to control its own procedures, requires an employer to pay the award to date and show probable cause that there has been a change in the employee's condition before the Commission will schedule a hearing. Even though employers usually suspend payments after an application is docketed, the

award continues and may be enforced in court until terminated by the Commission. The failure of the Commission to attempt to require payment to the date of final decision is neither "state action" nor is the employer's suspension done "under color of state law." Therefore the Court below lacked jurisdiction.

II. The dispute involves competing private claims for employers' funds. Every gain to employees comes at the expense of employers. Virginia has been sensitive to the needs of the employees. The Commission does not alter or terminate its awards until after a full due process hearing. The Virginia Workmen's Compensation procedures now furnish employees the process they are constitutionally due, and this Court should not alter that balance in the name of an abstract due process. To restrict further the employer's access to Commission hearings would deny them due process.

ARGUMENT

I.

The Court Below Lacked Jurisdiction Over The Claim Herein Asserted.

Claiming deprivation of rights granted by 42 U.S.C. § 1983 and, thereby, § 1 of the Fourteenth Amendment, appellants alleged jurisdiction under 28 U.S.C. §§ 1343(3), 2201, 2202, 2281 and 2284 (App. 6 and 70).

Sections 2281 and 2284 require a three-judge district court to exercise certain categories of jurisdiction granted elsewhere. Likewise, §§ 2201 and 2202, establishing declaratory judgment procedures, do not confer jurisdiction.

Thus, the only arguable jurisdictional basis is 42 U.S.C. § 1983, the Civil Rights Act of 1871. This Act proscribes only acts taken under color of a statute, ordinance, regu-

lation, custom or usage, of any State or Territory. The legislative history of the Civil Rights Acts of this period[3] shows that Congress feared that officials and citizens would use affirmative grants of state power to abuse and harass the freedmen. The Act's prohibitions were later expanded to abuses of authority by law enforcement officials. *Monroe* v. *Pape*, 365 U.S. 167 (1961). They have not been extended to private acts.

This Court has stated that "two elements are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.' " *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). Appellants have not made this distinction.

A. THE CONSTITUTION AND LAWS OF THE UNITED STATES DO NOT PROHIBIT A VIRGINIA EMPLOYER FROM SUSPENDING WORKMEN'S COMPENSATION BENEFITS PENDING A HEARING.

1. *An Employer's Temporary Suspension Of Payments Does Not Involve "State Action".*

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), this Court stated that it was an " 'impossible task' " to "fashion and apply a precise formula for recognition of state responsibility * * *." Eleven years later, this Court still acknowledged that "the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972).

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[3] Collected in A. Avins, *The Reconstruction Amendments' Debates* (1967). See, also, *The Slaughter-House Cases*, 16 Wall. 36 (1873).

The clear case is where state officers commit the wrong, but the remaining decisions fall into recognizable categories:

(a) Cases in which the private party's action occurred in the course of an enterprise in which the state is a partner or joint venturer. *E.g., Burton* v. *Wilmington Parking Authority, supra* and *Ihrke* v. *Northern States Power Co.,* 459 F.2d 566 (8th Cir.), *vacated and remanded with instructions to dismiss,* 409 U.S. 815 (1972).

(b) Cases in which a state custom or statute compels the act. *E.g., Adickes* v. *S. H. Kress & Co., supra* and *Moose Lodge No. 107* v. *Irvis, supra* at 177-79 (1972).

(c) Cases in which a governmental agency affirmatively orders or specifically approves the challenged act of a closely regulated public utility. *E.g., Public Utility Commission* v. *Pollack,* 343 U.S. 451 (1952).

(d) Cases in which a private agency acts on behalf of the state and furnishes a typical governmental service. *E.g., Marsh* v. *Alabama,* 326 U.S. 501 (1946).

(e) Cases in which private parties are empowered by statute or regulation to invade the premises or property of another. *E.g., Palmer* v. *Columbia Gas Company,* 479 F.2d 153 (6th Cir. 1973) and *Fuentes* v. *Shevin,* 407 U.S. 67 (1972).

Aetna's suspension of payment does not fit these categories. The disputed funds came from the claimant's employer, and neither it nor Aetna is a "partner" of the Commission. The Commission did not order the suspension nor did a statute or custom of Virginia compel Aetna's act. Contrary to appellants' argument (Appellants' Brief 10-11), wage continuation payments are not traditional govern-

mental functions, and certainly Aetna has not "dedicated" its funds to a public purpose. *See*, *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569 (1972). In summary, Virginia no more empowered or required Aetna to suspend payments than Pennsylvania empowered or required Moose Lodge No. 107 to refuse service to Mr. Irvis. *Moose Lodge No. 107* v. *Irvis*, *supra.*

Most cases cited by appellants involve governmental funds, governmental sanctioned intrusions, or discriminatory legislation. None of these situations is involved here.

Aetna's private funds must not be confused with the public funds in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). All citizens have an interest in public funds which must be disbursed so as to "promote the general welfare." *Cf.*, *Flast* v. *Cohen*, 392 U.S. 83 (1968). The ability of a government to tailor hearings to minimize its losses have made government largess the "new property."[4] By contrast, neither Aetna nor Roanoke Mills can choose the type of hearing they will be given; they must accept the form dictated by the state. Finally, neither the state nor national government can deprive Aetna or Roanoke Mills of their property without due process.

If this case involves governmental interference with property, the victim is the employer, not the employee. As appellants admit (Appellants' Brief 9-10), without Rule 13 the only method by which an employee could enforce his rights in the outstanding award would be by litigation in a court of record. In Rule 13, the Commission found a procedural method of insuring that an employee receives compensation to the date of his employer's application. The sanction was refusal to grant the employer a hearing. When Rule 13 was amended in 1972, the Commission,

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[4] C. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

in effect, held that it would not undertake the administrative burden of scheduling and holding the hearing unless the employer could establish that it had reasonable grounds to believe that there was a change in condition. During the interim between the acceptance of the employer's application and the Commission's order following a full hearing, the award remains outstanding and enforceable. As a practical matter, hearings are so prompt that there is minimal recourse to court enforcement.

Seen in this light, Rule 13 is a procedural enhancement of the employee's rights. It supplements, rather than replaces, the employee's rights at the full hearing. Thus, the position of the employer is like that of the debtor in *Fuentes* v. *Shevin, supra* at 87, *et seq.* The creditor-employee seeks additional interim state intervention requiring additional payments prior to a hearing on the employer-debtor's claim of excuse. Unlike *Fuentes,* however, the employer-debtor can never recoup the amounts paid between the notice and hearing. Va. Code § 65.1-99. Moreover, the employee still has the same enforcement rights against the employer during this interim period as he had prior to the employer's application, and if the employer fails to prove a change in condition, the employee is immediately made whole.

Aetna admits that state action is involved in the act of legislating. *See, e.g., Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972) and *Stanley* v. *Illinois,* 405 U.S. 645 (1972). However, the state action challenged in these cases was improper legislative classification. Appellants do not herein allege a discriminatory classification, so the equal protection cases are inapplicable.

The focus of appellant's attack is Rule 13. The Commission's promulgation of Rule 13 and its "probable cause" determination before scheduling each hearing involve state action. However, neither action suspends payments to an

employee. There is no deprivation of protected rights, because a Virginia employee never had—under common law or statute—a stronger claim to payments than he now has under Rule 13.

In attempting to satisfy the requirement of state action, appellants apparently contend that employers and insurance carriers act as government surrogates and that as such their funds are public property (Appellants' Brief 11-12). However, no dedication of funds to the public has been shown, and employer and insurer do not, by virtue of the Virginia Workmen's Compensation Act, become the equivalent of public agencies.

In support of their position, appellants argue that the state could have chosen to pay workmen's compensation itself rather than require private parties to make the payments. But the fact that superficially similar services such as welfare payments are provided by the state does not mean that a private party has dedicated its property to the public. *Lloyd Corp.* v. *Tanner, supra* at 569-70 (1972). "The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use." *Id.* at 569. The funds of employers and insurers do not lose their private character merely because employees are granted claims against employers during disability.

Virginia has chosen to limit rather than prohibit a private party's suspension of payments prior to a full hearing. Appellants seek to transmute this failure to prohibit into state action. Their argument may be summarized as follows: Having improved employees' rights against their employers, Virginia acted (or aided the employers in acting) by not giving the employees even greater rights against their employers. This theory of state action by inaction was widely discussed in academic circles prior to passage of the Civil Rights Act of 1964 and 1968, but it has not

prevailed in this Court. *Cf., Evans* v. *Abney,* 396 U.S. 435 (1970). See, also, *Lucas* v. *Wisconsin Elec. Power Co.,* 466 F.2d 638, 647-48 (7th Cir. 1972), *cert. denied,* 409 U.S. 1114 (1973). The reason is obvious. To accept this proposition is to add a § 6 to the Fourteenth Amendment: "No State shall permit private parties to commit acts herein denied the States."

2. *Appellants' Expectancy In Receiving Additional Payments By Commission Order Is Not "Property."*

"Property" is an elastic concept encompassing personal right in tangible goods or income protected by law. *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 551, et seq. (1972). Expressed differently, a test of property is the legitimacy of one's "concern" over a claim. *Board of Regents* v. *Roth,* 408 U.S. 564, 576, et seq. (1972). Unless an employer desires a hearing, an employee must enforce his award in a court of record. Thus the "concern" or expectancy of an employee, whose employer has probable cause to believe he is no longer entitled to benefits, has even less legitimacy, and he should not be given a greater property interest.

Compared to the cases they cite, appellants' claim to "property" is weak. In *Lynch* v. *Household Finance Corp., supra,* for example, petitioner owned his savings. In *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1972), petitioner had clear property in the earned wages. And in *Fuentes v. Shevin, supra,* the debtors had possession. Thus, unlike other cases involving conflicting private interests, appellants have neither title nor possession. The award is for payments "during incapacity"; "[w]hen incapacity ceases, the award ceases to exist." *Dillard* v. *Industrial Commission,* 347 F.Supp. 71, 75 (E.D.Va. 1972) (App. 46, 52).

B. Aetna's Suspension Of Benefits Was Not Done Under Color Of Any Virginia Statute, Regulation, Custom Or Usage.

Aetna's decision to suspend benefits was unilateral and not pursuant to any directive from the Commonwealth of Virginia. On the contrary, Rule 13 restricted its inherent right to control its own funds by requiring that certain procedures be followed in the event it desired a hearing to determine whether Mr. Dillard's condition had changed.

Rule 13 does not direct or authorize employers and insurers to suspend payments; there is no statute or regulation which compels the suspension of payments upon compliance with the procedural steps of the Rule. *Dillard* v. *Industrial Commission, supra,* at 74-75 (App. 50-51). And to support § 1983 jurisdiction, custom or usage "must have the force of law by virtue of the persistent practices of state officials." *Adickes* v. *S. H. Kress & Co., supra* at 159. Under the undisputed evidence, neither the state nor its officials compelled or encouraged Aetna to suspend Mr. Dillard's benefits. Indeed, appellants admit that the employer's self-interest is the motivation for termination (Appellant's Brief 22).

Unlike the state of California in *Reitman* v. *Mulkey,* 387 U.S. 369 (1967), Virginia has not encouraged insurance carriers to suspend payments or given them greater rights to do so than they had at common law. There is no showing of conspiracy or joint action between Aetna and state officials which causes the suspension of benefits.

Appellants have failed to distinguish between actions which are performed by private parties pursuant to compulsion by the state and private actions which are voluntary and without compulsion by the state or its officials. Unless the challenged action is performed by private

parties in lieu of the state or in obedience to some positive provisions of state law or custom, the action does not furnish a basis for a claim under § 1983. The fact that state law or custom permits the act is not sufficient to support a finding of action under color of state law. *Williams* v. *Howard Johnson's Restaurant,* 268 F.2d 845, 847 (4th Cir. 1959); *Western* v. *Hodgson,* 359 F.Supp. 194, 199 (S.D.W.Va. 1973); *Kirksey* v. *Theilig,* 351 F.Supp. 727, 732 (D. Colo. 1972); *Warren* v. *Cummings,* 303 F.Supp. 803, 806 (D. Colo. 1969).

Dillard's real complaint is not that Aetna acted under color of state law in terminating his benefits but that there was no state action to restrict further Aetna's ability to terminate. But § 1983 speaks to action by the state or its officials, not inaction. Even if § 1983 is interpreted to prohibit the state's failure to enforce valid laws, which would be unlawful as a denial of equal protection, inaction in failing to enact legislation to correct private action is beyond the scope of § 1983. *See, Adickes* v. *S. H. Kress & Co., supra* at 167, fn. 39.

Before Rule 13 was adopted, employers could terminate payments without prior procedural restriction. Termination of benefits was "without legal sanction". *Manchester Board and Paper Co.* v. *Parker, supra,* 201 Va. at 332, 111 S.E.2d at 456. Prior to the adoption of Rule 13, therefore, the insurance carrier was not acting under color of state law in terminating benefits but rather was exercising its inherent right to control its own funds, subject to subsequent review.

Appellants apparently contend that with the adoption of Rule 13, the state undertook to sanction suspension of benefits. They conclude that when an employer or carrier suspends benefits after following the procedures of Rule 13, it is

acting under color of state law. This position ignores the procedural nature of Rule 13, however. *Manchester Board and Paper Co.* v. *Parker, supra,* 201 Va. at 328, 111 S.E.2d at 456.

Virginia does not sanction the suspension or enforce the termination, since the question whether suspension is proper remains for determination at a full hearing. Only then is the award terminated. No one can properly equate an interim procedural restriction on an employer or carrier's ability to obtain a hearing with a "legal sanction." *Cf., Evans* v. *Abney, supra.*

II.

The Procedures Established Under Rule 13 Adequately Balance The Conflicting Interests Of Employee And Employer And Grant The Employee The Process He Is Constitutionally Due.

"Due process" is not a procrustean standard making the same procedural demands in all situations. Rather, its requirements depend on the legislative and common law background, a weighing of the interests involved and notions of fair play. The present balance amply protects the interim interests of the employee.

A. The Statutory Compensation Scheme Represents An Improvement In An Employee's Right Of Recovery From His Employer For Work Related Disability.

The Virginia workmen's compensation scheme guarantees an employee a sure, speedy and simple method of recovering for job related disability. Employers are required to provide workmen's compensation coverage for all employees. A review of the history of the Act shows continual changes in the procedures and recoveries favoring the employees.

E.g., Va. Code § 65.1-55. Each advance has been at the employer's expense.

Lindsey v. *Normet*, 405 U.S. 56 (1972), more closely parallels this case with regard to the common law rights of the parties than any case cited by appellant. Oregon's statutory scheme eliminated the landlord's common law right to self-help eviction. This change gave the tenant-debtor greater protection. The landlord, however, was given a speedy hearing on his right to possession, and the tenant's defenses at the hearing were limited. In approving this procedure, this Court recognized that to favor the tenant further tended to deny the landlord his constitutional rights to his property without due process. *Id.* at 67, fn. 13.

As did the Oregon legislature in *Lindsey,* the Virginia legislature altered the common law balance between parties. Virginia eliminated the employer's common law defenses and guaranteed the employee's recovery for work related disabilities. Virginia made a major improvement in the area emphasized by appellants—the need for immediate compensation. At common law, recovery could be had only after the extent of the injury could be ascertained, suit filed, matured and tried to a conclusion. With appeal, recovery could be years away. The record shows that Mr. Dillard began receiving payments 23 days after injury (App. 41) —a major improvement over the common law.

B. The Cost Of Rule 13 Falls On The Individual Employer; A Further Weighing Of The Scales In Favor Of The Employee Would Violate The Employer's Constitutional Rights.

Appellants have spoken of Dillard and Williams' needs, but their needs are not representative of the Class. Workmen's compensation comes to all covered employees—rich and poor, hourly paid and executive. There is no need test;

the beneficiary can be a millionaire movie star or a marginal worker. Moreover, termination of workmen's compensation does not deprive an employee of access to welfare programs. Depending on the facts of the case, appellants may be entitled to "emergency relief" under the general welfare laws (Va. Code § 63.1-106), food stamps (7 U.S.C. § 2011, *et seq.*), commodity assistance (7 U.S.C. § 1431), and a host of other public and private relief programs.

The employee's interest must be weighed against the competing interest of his employer. Absent agreement, the employer can petition the Commission to amend its award only according to the procedures of Rule 13. If appellants prevail here and Mr. Williams returns to work, Richmond Guano Co., his employer must continue compensation payments and wages until the Commission scheduled a hearing and issued a decision. Richmond Guano would have no right of offset, and the Commission would be powerless to affect amounts paid. Va. Code § 65.1-99. The same inequity would exist if Mr. Williams refused to sign an agreed statement of fact and began working elsewhere, refused medical treatment, refused to report for a medical examination, rejected available work or was declared fit by his own doctor. At the hearing his claim would be rejected, but the employer would be prohibited from recovering the amounts paid. Appellants' argument requires payment until the employee's rights are finally adjudicated. If Mr. Williams chose to appeal he would continue to receive payments long after he returned to work or was otherwise disentitled.

By contrast, if the Commission determines that the termination was premature, Mr. Williams will lose only a few weeks use of the money (App. 37) and may recover a penalty if the employer's conduct so justifies. Va. Code §§ 65.1-75.1 and -101.

To the scales should be added Virginia's amended Rule 13 which protects an employee from arbitrary and frivolous termination by requiring that the employer show an independent reviewing body that there is "probable validity." *Sniadach* v. *Family Finance Corporation, supra,* at 343 (Mr. Justice Harlan concurring). Contrast *Davis* v. *Caldwell,* 53 F.R.D. 373, 378 (N.D.Ga. 1971).[5]

Finally, it is not acceptable to argue (Appellants' Brief 20-21) that over the long run the losses will be uniformly passed on to society and the individual employer will not be injured. The same rationale would support a denial of compensation for public taking: If enough property is taken over a long enough period of time, the losses would be spread equally and no one would be hurt.

C. The Court Below Was Correct In Finding That Rule 13 Adequately Protects The Employee's Interest.

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contest* * * [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the nature of the burden on that proceeding are all considerations which must be taken in account.

Hannah v. *Lache,* 363 U.S. 420, 442 (1960). Accord, *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367

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[5] "[I]t is clear beyond peradventure that the [Georgia] practice in the workmen's compensation field is immediate termination, with or without notice, upon the slightest suspicion of a change of condition."

U.S. 886, 895 (1961) and *Groppi* v. *Leslie,* 404 U.S. 496 (1972).

The present Commission procedures afford claimants full due process protection. Before any award is increased or diminished the parties to the award, aided by their counsel, are entitled a full evidentiary hearing on the merits. As in many other states, a vigorous plaintiff's bar has formed to protect the rights of claimants.

In addition to these procedural protections, the Commonwealth of Virginia has provided additional protections for claimants. For example, the Supreme Court of Virginia liberally construes the Act in favor of employees and the Commission limits the employer's or insurer's right to stop payments when a claimant's eligibility is challenged. One such limitation lies in the Commission's power to penalize an insurer or employer for wrongfully withholding payments. A second limitation is Rule 13. Under Rule 13, an employer or insurer can obtain a hearing as to the continuing eligibility of a claimant only if all compensation payments have been paid. Even though, under Virginia law, an insurer or employer loses all rights to challenge a payment once made, the insurer or employer cannot safely suspend payments until the Commission determines "that probable cause exists to believe that a change in condition has occurred" and dockets the application.

Petitioners challenge this latter procedure on the ground that insurers and employers have been allowed to make their showings of probable cause in an *ex parte* proceeding. To remedy this perceived violation of "due process", petitioners seek to extend rather than eliminate Rule 13. They do not seek additional notice or an opportunity to appear at the "probable cause" hearing (Appellants' Brief 25). There would, as a matter of Virginia law, be no defenses

which a claimant would raise at this hearing, for the Commission has, in effect, ruled this preliminary hearing is intended to view the employer or insurer's evidence in its best light, much as a "probable cause" hearing under the Fourth Amendment. Cf., *Lindsey* v. *Normet, supra.*

The requested relief would alter the balance Virginia has struck between employers and employees. Employers would be further deprived of their property as a condition to a hearing, and the procedure would encourage claimants to demand hearings even though they were not entitled to further payments, since the pre-determination windfall would be forever theirs. To protect themselves, employers would file premature applications, and hope that claimants would have recovered by the time of the hearing. In short, appellants seek a result which would destroy the established working balance, generate excessive litigation, create employer dissatisfaction and, perhaps, "undermine" the entire system of workmen's compensation. *The Report of the National Commission on State Workmen's Compensation Laws* 100 (1972).

The Virginia legislature, courts and Commission have shown great sensitivity to the needs of employees. There is no evidence of any abuses of the Virginia system, and there exist adequate sanctions to deter arbitrary action. *See, Dillard* v. *Industrial Commission, supra,* at 75 (App. 51).

In upholding the early Workmen's Compensation statutes against employer attack, this Court held that the "states are left with a wide range of legislative discretion, notwithstanding the provisions of the 14th Amendment * * *." *Arizona Copper Co.* v. *Hammer, supra,* at 419. The same answer should be given appellants.

CONCLUSION

For the reasons stated herein and by the Court below, we respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

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42 U.S.C. § 1983, 17 Stat. 13

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 65.1-100, Code of Virginia of 1950, as amended

Judgment on agreement or award; enforcement of certain fines and decisions.—Any party in interest may file in the circuit or corporation court of the county or city in which the injury occurred, or if it be in the City of Richmond then in the circuit or law and equity court of such city, a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from, or of an award of the Commission affirmed upon appeal, whereupon the court, or the judge thereof in vacation, shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though such judgment had been rendered in a suit duly heard and determined by the court. The fines imposed and decisions rendered under §§ 65.1-106, 65.1-107 and 65.1-127, shall be enforceable as provided herein for the enforcement of other decisions, orders or awards of the Commission. If such injury occurred outside the State, then such certified copy of the memorandum of agreement, order, decision or award may be filed in the circuit or corporation court of the county or city wherein the same might be brought as an action at law or suit in equity.

Section 65.1-101, Code of Virginia of 1950, as amended

Costs.—If the Industrial Commission or any court before whom any proceedings are brought or defended by the employer under this Act shall determine that such proceedings have been brought, prosecuted or defended without reasonable grounds, it may assess against the employer who has so brought, prosecuted or defended them the whole cost of the proceedings, including a reasonable attorney fee, to be fixed by the Commission.